

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Mark H. Fulling
Garden City, Kansas

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NAL/Acct. No. 815KC0004

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2000

Released: March 29, 2000

By the Commission:

1. In this Order, we dismiss in part and deny in part the March 31, 1999 application for review filed by Mark H. Fulling of the *Forfeiture Order*¹ in this proceeding. Pursuant to Section 503(b) of the Communications Act of 1934, as amended (“the Act”), 47 U.S.C. § 503(b), and Section 1.80 of the Commission’s Rules (“the Rules”), 47 C.F.R. § 1.80, the former Compliance and Information Bureau found Mr. Fulling liable for a monetary forfeiture in the amount of \$8,000 for operation of an unlicensed FM broadcast station, in willful violation of Section 301 of the Act, 47 U.S.C. § 301. For the reasons discussed below, we dismiss the application in part as procedurally defective, deny the remainder of the application, and affirm the \$8,000 forfeiture.

BACKGROUND

2. In response to a complaint regarding an unlicensed radio station broadcasting on the frequency of 102.1 MHz in Garden City, Kansas, the Commission’s Kansas City Field Office verified that no license had been issued for operation on that frequency in that location. The agent determined by monitoring that the unlicensed radio station was transmitting from Mr. Fulling’s residence. On August 26, 1998, the agent attempted to inspect the station. At that time, Mr. Fulling admitted that he was operating with nine watts of power. Mr. Fulling also stated that he was aware that the Commission was considering changing the broadcast rules to allow low-power FM broadcasts such as his operation, but refused to allow the inspection. Mr. Fulling was given a written warning informing him of the penalties for unlicensed broadcast operations on August 26, 1998.

3. On September 2, 1998, the District Director of the Kansas City Field Office issued a Notice of Apparent Liability for a monetary forfeiture in the amount of \$8,000 to Mr. Fulling for willful and repeated violations of Section 301 of the Act. In his written response to the NAL, Mr. Fulling denied committing any violations of any of the Commission’s regulations, and claimed that his radio equipment met or exceeded Commission specifications, that his broadcasts did not cause interference to any licensed radio station, and that he did not intend to broadcast again without a license. The *Forfeiture Order* released on March 1, 1999 affirmed the forfeiture, stating that Mr. Fulling’s reliance on the arguments noted above was misplaced and only served as an admission to the violation of Section 301 of the Act.²

¹ 14 FCC Rcd 3479 (Compl. & Inf. Bur. 1999).

² See *Stephen Paul Dunifer*, 11 FCC Rcd 718, 727 (1995) (Section 301 of the Act specifically prohibits the transmission of radio communications without a license and there is no support for the view that this licensing requirement cannot be enforced unless there is a specific showing that the unlicensed radio transmission caused or may cause harmful interference). See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 209-217 (1943).

4. In his application for review, Mr. Fulling contends that (1) the Commission committed prejudicial procedural error by failing to mail a copy of the *Forfeiture Order* to him or his attorney “within a reasonable time” after it was released;³ (2) the *Forfeiture Order* should be dismissed or stayed pending the outcome of the low power FM rulemaking; (3) the *Forfeiture Order* erroneously found that Mr. Fulling admitted to operating broadcast equipment without a license; (4) the Commission failed to properly apply the statutory penalty factors and downward adjustment criteria set out in its Forfeiture Policy Statement; and (5) there was no evidence that the Commission took into account Mr. Fulling’s ability to pay, “as required by statute,” in assessing the forfeiture amount.⁴

DISCUSSION

5. With the exception of the claim that he did not admit to operating broadcast equipment without a license, Mr. Fulling’s arguments are procedurally barred by Section 1.115(c) of our rules because they rely on questions of fact and law upon which the designated authority has been afforded no opportunity to pass. See 47 C.F.R. 1.115(c); *American Mobilephone, Inc.*, FCC 00-15, 2000 WL 29952 (released January 18, 2000); *Courtesy Communications, Inc.*, 14 FCC Rcd 4198, 4202-4203 (1999); *Kevin Johnson*, 9 FCC Rcd 2471, 2473 (1993); *Sherry Rullman*, 8 FCC Rcd 4012 (1993). The proper procedure would have been for Mr. Fulling to file a petition for reconsideration of the *Forfeiture Order*, pursuant to Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106.

6. The finding that Mr. Fulling admitted that he was operating the station without a license is based on comments made by Mr. Fulling in the presence of the FCC agent and a local police officer during the August 26, 1998 attempted inspection of Mr. Fulling’s unlicensed station. When the officer and the FCC agent approached Mr. Fulling at his residence, Mr. Fulling indicated that he knew why they wanted to speak to him, and stated that he was expecting them because he had spotted the direction finding vehicle the previous evening. Mr. Fulling informed the officer and FCC agent that he was only using nine watts of power and that he was aware that the Commission had been looking at changing the Rules to allow community and neighborhood broadcasting such as his operation. He also admitted to operating without a license, after refusing to allow the agent to enter the premises to inspect the station. Although Mr. Fulling now claims he did not admit to operating the station without license, the foregoing facts belie that assertion.

ORDERING CLAUSES

7. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 1.115(c) of the Rules, 47 C.F.R. § 1.115(c), Mark H. Fulling’s application for review of the *Forfeiture Order* for NAL No. 815KC0004 **IS DISMISSED IN PART AND DENIED IN PART.**

8. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, Mark H. Fulling must pay the amount of \$8,000 within thirty (30) days of the release date of this Order. Payment may be made by check or money order, drawn on a U.S. financial institution, payable to the Federal Communications Commission. Payment may

³ Mr. Fulling contends that the *Forfeiture Order* was mailed eight days after its release.

⁴ Mr. Fulling also contends that the ban on most low-power FM broadcasting violates the First Amendment to the U.S. Constitution, and that assessment of a forfeiture without a hearing violates the Fifth Amendment to the Constitution, but explicitly reserves these arguments for judicial review.

also be made by credit card with the appropriate documentation.⁵ The remittance should be marked "NAL Acct. No. 815KC0004" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days will be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

9. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by certified mail, return-receipt requested, to Mark H. Fulling, in care of his counsel of record, Dennis J. Highberger, 1301 Vermont, Lawrence, Kansas 66044.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁵ Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Requests for installment plans should be mailed to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554. For information regarding credit card payments, the Chief, Credit and Debt Management Center, should be contacted at (202) 418-1995.